SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
MAR 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

DAVID VON G. ALBRECHT,
DAVID P. SIEGEL,
O. JOHN ROGGE,
Attorneys for Petitioner.

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. The Federal Obscenity Statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, violates the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the states and to the people	8
II. The instant federal obscenity statute violates the freedom of speech and of the press guarantees of the First Amendment	24
III. The instant federal obscenity statute violates the due process clause of the Fifth Amendment	34
CONCLUSION	41

CITATIONS

Cases:

Abrams v. United States, 250 U. S. 616, 631 (1919)	27
American Communications Association v. Dowds, 339 U. S. 382 (1950)	9
Beauharnais v. Illinois, 343 U. S. 250, 288, 294 (1952)	9, 11, 13, *passim*

PAGE

Brown v. Kingsley Books, 1 N. Y. 2d 177, 155 N. Y. S. 2d 639, 134 N. E. 2d 461 (1956); probable jurisdiction noted, 352 U. S. 962 (1957) 30, 32
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 ....26, 35, 38
Burton v. United States, 202 U. S. 344, 371 (1906) .. 22
Butler v. Michigan, 25 U. S. L. Week 4165 (U. S. Feb. 25, 1957) 26, 33, 34, 40

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210 (1932) 37
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) 24, 35
Clearfield Trust Co. v. United States, 318 U. S. 363 (1943) 17
Cline v. Frank Dairy Co., 274 U. S. 445 (1927) 37
Collins v. Kentucky, 234 U. S. 634 (1914) 37
Commercial Pictures Corp. v. Board of Regents, 346 U. S. 587 (1954) 37
Connally v. General Construction Co., 269 U. S. 385 (1926) 37

Dennis v. United States, 341 U. S. 494 (1951) 24, 26, 29
D'Oench, Duhme & Co. v. FDIC, 315 U. S. 447 (1942) 17
Doubleday v. New York, 335 U. S. 848 (1948) 26

Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938) 17
Esquire v. Walker, 151 F. 2d 49, 55 (1945), affirmed sub nom, Hannegan v. Esquire, 327 U. S. 146 (1946) 18

Gelling v. Texas, 343 U. S. 960 (1952) 38
Gitlow v. New York, 268 U. S. 652, 672 (1925) 9, 12

Hannegan v. Esquire, 327 U. S. 146, 158 (1946) ... 26
Herndon v. Lowry, 301 U. S. 242 (1937) 37
Holmby Productions v. Vaughan, 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412 .... 26, 35

International Harvester Co. v. Kentucky, 234 U. S. 216 (1914) 37

PAGE

Jackson, Ex parte, 96 U. S. 727 (1878) 21, 23
Jerome v. United States, 318 U. S. 101, 104, 105 (1943) 14

Kraus & Bros. v. United States, 327 U. S. 614 (1946) 37

Lanzetta v. New Jersey, 306 U. S. 451 (1939) 37

Malinski v. New York, 324 U. S. 401, 412, 413 (1945) 14
Musser v. Utah, 333 U. S. 95 (1948) 36, 40

Near v. Minnesota, 283 U. S. 697 ..... 27, 35

Palko v. Connecticut, 302 U. S. 319 (1937) 13
Pike v. Walker, 121 F. 2d 37, 39, cert. denied, 314 U. S. 625 (1941) 23

Rochin v. California, 342 U. S. 165, 168 (1952) 14

Schenck v. United States, 249 U. S. 47 (1919) 29
Smith v. Cahoon, 283 U. S. 553 (1931) 37
Stromberg v. California, 283 U. S. 359 27
Superior Films v. Dept. of Education, 346 U. S. 587 26
Superior Films Inc. v. Ohio, 346 U. S. 587 (1954) .. 37

United States v. Alpers, 338 U. S. 680 (1949) 26
United States v. Cardiff, 344 U. S. 174 (1952) 37
United States v. C.I.O., 335 U. S. 106, 150-153 (1948) 40
United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 37
United States v. One Book Entitled Ulysses, 72 F. 2d 705 (2d Cir. 1934), affirming 5 F. Supp. 182 (D. S. D. N. Y. 1933) 5
United States v. Reese, 92 U. S. 214, 220 (1876) 36
United States v. Turley, 25 U. S. L. Week 4162 (U. S. Feb. 25, 1957) 17
United States v. Williams, 341 U. S. 70 (1951) 25

Winters v. New York, 333 U. S. 507, 510 (1948) 26, 36

PAGE

Constitution and Statutes:

Act of June 28, 1955, 69 Stat. 183 3
Art. I, §8, cls. 3, 7 of the Constitution 17
First Amendment 2
Fifth Amendment ..... 2; 6, *passim*
Ninth Amendment ..... 2, 7, *passim*
Tenth Amendment ..... 2, 7, *passim*
Fourteenth Amendment 6
18 U. S. C. §1461, 62 Stat. 768 (derived from R.S. §3893, and originally passed as §148 of an Act of June 8, 1872, 17 Stat. 302) 2
18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183 ..... 3, 4, *passim*
18 U. S. C. §§2 and 1461, 62 Stat. 768, §371, 62 Stat. 701 4
18 U. S. C. §§1691-1733, 62 Stat. 776-785 17
28 U. S. C. §1254 (1) ..... 2, 6, *passim*

Other Authorities:

Alpert, "Judicial Censorship of Obscene Literature", 52 Harv. L. Rev. 40, 53 ff. (1938) 16, 25, 30
1 Annals of the Congress of the United States 435 (Gales comp. 1834) 14
Bell, Youth Tell Their Story (1938) 30
Chafee, Free Speech in the United States 150 (1941) 14
Comment, Federal Police Power Turns to the Postal Clause, 5 Fordham L. Rev. 302, 305-310 (1936) .. 22
Cong. Globe App., 24th Cong., 1st Sess. 439 (1836) .. 20
Cong. Globe App., 24th Cong., 1st Sess. 442 (1836) . 18
Cong. Globe, 24th Cong., 1st Sess. 10 (1835) 18
Cong. Globe, 24th Cong., 1st Sess. 36-37 (1835) 19
Cong. Globe, 24th Cong., 1st Sess. 299 (1836) 20
Cushman, National Police Power Under the Postal

PAGE

Clause of the Constitution, 4 Minn. L. Rev. 402, 404-405 ..... 17, 22, 25

1 The Debates and Proceedings in the Congress of the United States, 452 (Gales ed. 1834) 14

Deutsch, Freedom of the Press and of the Mails, 36 Mich. Law Review 703, 717, 723 (1938) 22, 26

Elliott's Debates 545 (1901) 10

Ernst & Seagle, To the Pure 69-70 (1928) 14, 15, 16

The Federalist 631 (Hamilton ed. 1864) 10

Fluegel, The Psychology of Clothes 34

Free Speech in the United States 22 (1948) 28

Grant and Angoff, Massachusetts and Censorship, 10 B. U. L. Rev. 36, 147 (1930) 14, 16, 38

Hart, Power of Government over Speech and Press, 29 Yale L. J. 410, 412 (1920) 10

2 History of the Criminal Law 300 (1883) 28

International Psychoanalytic Library, No. 18, Dr. Ernest Jones ed. 1930 34

John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 225-226 (1955) 12

Kinsey, Sexual Behavior in the Human Female 669-672 (1953) 33

Lockhart and McClure in Obscenity In the Courts, 20 Law & Contemp. Prob. 587, 596 (1955) 31

Lockhart & McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 301, 352-358 (1954) 25

6 McMaster, History of the People of the United States, 288-291 (1883) 22

Meiklejohn, Free Speech: And Its Relation to Self-Government, chap. 2 (1948) 29

Miller, Crisis in Freedom, 168-169 (1951) 12

PAGE

Note, Due Process Requirements of Definiteness in Statutes, 62 Harv. L. Rev. 77 (1948) 40

Ramsey, The Sex Information of Younger Boys, 13 Jour. of Orthopsychiatry 347-352 (1943) 33

Report of the Select Committee on Current Pornographic Material, H. R. Rep. No. 2510, 82d Cong. 2d Sess. 34 (1952) 15, 25

Rogers, Postal Power of Congress 23 (1916) 17

Rogers, The Extension of Federal Control Through the Regulations of the Mails, 27 Harv. L. Rev. 27, 29-30 (1913) 22

Schroeder, "Obscene" Literature and Constitutional Law, 139-140 (1911) 14, 22

Sheldon and Eleanor Glueck, Unraveling Juvenile Delinquency (The Commonwealth Fund 1950) ... 33

S. Rep. 118, 24th Cong. 1st Sess. 1-3 (1836) 20

St. John-Stevas, Obscenity and the Law, 195-202 (1956) 33

IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 40-96) is reported at 237 F. 2d 796. The United States District Court for the Southern District of New York issued no opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 18, 1956 (R. 97).

By order of Mr. Justice HARLAN entered on October 9, 1956 the time for filing a petition for a writ of certiorari was extended to and including November 17, 1956 and the defendant was placed on bail of $5,000.00 (R. 98). 77 S. Ct. 17. The petition for a writ of certiorari was filed on No-

vember 16, 1956 and granted on January 14, 1957 as to the three questions considered in this brief (R. 98-99). 352 U. S. 964.

The jurisdiction of this Court rests in 28 U. S. C. §1254 (1).

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

2. Fifth Amendment.

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

3. Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. 62 Stat. 768; 18 U. S. C. §1461 (derived from R.S. §3893, and originally passed as §148 of an Act of June 8, 1872, 17 Stat. 302). **"Mailing obscene or crime-inciting matter:**

> "Every obscene, lewd, lascivious or filthy book,

pamphlet, picture, papers, letter, writing, print, or other publication of an indecent character; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

"Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, * * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

This section was further amended by an Act of June 28, 1955, 69 Stat. 183, but the indictment and the court's charge to the jury were based on the section as it stood before the 1955 amendment.

Questions Presented

"1. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech

and freedom of the press guarantees of the First Amendment?

"2. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

"3. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?"

Statement of the Case

This prosecution originated in a multitudinous indictment of 26 counts which was found by a grand jury in the Southern District of New York in July 1955. It charged the defendant with wrongfully depositing for mailing and delivery certain matter alleged to be in violation of Title 18 U. S. C. §§2 and 1461, 62 Stat. 768, and a conspiracy count under §371, 62 Stat. 701.

The case came on for trial before District Judge John M. Cashin and a jury in January 1956. In the course of the trial counts 12 and 25 of the indictment were dismissed on motion of the defense counsel with the government's consent. Count 26, the conspiracy count, was dismissed on motion of the defense counsel after argument. The case went to the jury on January 12, 1956. They returned a verdict on that day finding the defendant guilty on but four counts, 10, 13, 17 and 24, and not guilty as to the remaining nineteen counts of the indictment.

The judgment of the court was rendered on February 7, 1956. The court imposed a maximum sentence of five years

and a fine of $5,000 on count 10 (the defendant to be committed until such fine be paid), and sentenced him to a like term on counts 13, 17 and 24, running concurrently with the sentence of five years on count 10, and fined the defendant-petitioner $1 each on counts 13, 17 and 24, which fines of $1, however, were remitted (R. 1-2).

The Court of Appeals for the Second Circuit affirmed the judgment of the court below, but it felt constrained to refuse to consider the claim of the unconstitutionality of 18 U. S. C. A. §1461 on the ground that any such claim, as to this statute, was one for this Court alone.

Chief Judge Clark in the course of his opinion took occasion to say that the trial judge in imposing sentence pointed out that the defendant had been convicted several times before under both state and federal law (R. 47). 237 F. 2d at 800. The petitioner contends that there was no basis in the trial record for this statement. He did not take the stand, so he did not give his side of the controversy. At the time of sentence, Judge Cashin did refer to the fact that defendant had been convicted on a number of occasions.

Petitioner claimed before this Court that his previous encounters with the law arose as a result of his publications. Those cases in which he was convicted involved the sale of *Ulysses* by James Joyce, a book which was subsequently held to be not obscene in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (2d Cir. 1934), *affirming* 5 F. Supp. 182 (D. S. D. N. Y. 1933); the English version of Arthur Schnitzler's *Reigen*, a movie from which under the title *La Ronde*, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S.

587 (1954); Sir Richard Burton's translation of *The Perfumed Garden*, a classic fourteenth century Arabic work; *American Anecdotes*, a volume which is now available to the public; a translation of *The Anaga Ranga*, a famous Hindu classic dealing with the art of love in the style of the Latin *Ovid*; and two stories by Boccaccio that can now be obtained at the New York Public Library and purchased in any book store. His other engagements with the law, in which he obtained dismissals, involved the publication of Benjamin Franklin's essay entitled *To a Young Man on How to Choose a Mistress; Celestine*, which is the English version of *The Diary of a Chambermaid* by Octave Mirbeau, and which the New York public library now has available on its bookshelves with an introduction by Jules Romaine; and *Beautiful Sinners of New York*. Petitioner has written for such newspapers and magazines as the *Nation, Harper's Weekly, The Daily Mail, The Jewish Chronicle of London, The Boston Transcript* and *The New York Herald*. He is the author of several books, among them *Europe*, published by Liveright; *Now And Forever*, published by Robert McBride Co.; and *A Study In Consciousness*, with an introduction by Sir Arthur Eddington, the great English philosopher and mathematician. Petitioner is also the editor of Voltaire's *Philosophical Dictionary*. He has long been an important figure in the defense of free press freedoms.

Summary of Argument

Obscenity laws to be valid under the sweeping prohibitions of the First Amendment, the due process clauses of the Fifth and Fourteenth Amendments, and the reserva-

tions of rights and powers to the states and to the people of the Ninth and Tenth Amendments, should exist only on a state level, and should be only civil not penal in nature. The Ninth and Tenth Amendments make plain that under our federal system the maintenance of order and decency is primarily a state function. Especially should this be true with reference to obscenity, which is definable, if at all, and punishable only by reference to local standards of decency and morality. There can be no federal power with respect to such a purely local offense. It is incompatible with basic notions of federal competence that a publication should be capable of violating the federal obscenity statute if prosecuted in Boston and not violating that same statute if prosecuted in New York City.

Federal obscenity statutes violate the prohibitions of the First Amendment. The framers of the First Amendment provided no exceptions whatever to its absolute proscriptions. Whatever qualifications have been judicially imposed on the absolute language of the First Amendment when speech approaches action which the Congress may regulate or prohibit, no such qualifications are permissible when the speech Congress prohibits or punishes is unrelated to action which is the express subject of federal power. The First Amendment, when read literally, or historically in conjunction with the Ninth and Tenth Amendments, is an unqualifiedly absolute bar to federal authority over utterances allegedly obscene as well as those allegedly libelous, defamatory, or slanderous, all of which are, in essence, breaches of the peace intended by these three Amendments together to be unexceptionally withdrawn from the federal government and exclusively reserved to the states.

But even if in these areas the First Amendment be read as subject to Justice Holmes' classic clear and present danger test, obscenity statutes do not fall within this narrow exception. For there is no reliable evidence that obscene publications or pictures have any appreciable effect on the conduct of human beings.

In an event, criminal obscenity statutes cannot meet the requirements of the due process clauses of the Fifth Amendment. An individual should be able to know with certainty whether he has committed a crime. But no one knows whether material is obscene until after a jury of the community has rendered its verdict. Such verdicts will vary with the time and place.

If there must be statutes dealing with obscenity, they should be not only on a state level but also contain only civil injunctive sanctions. And even such sanctions should not come into operation until *after* a local jury has rendered its verdict.

ARGUMENT

I.

The Federal Obscenity Statute, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, violates the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the states and to the people.

The founders of this country, out of an abundance of caution, expressly provided:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

We believe that when properly understood, the absoluteness of the language of the First Amendment is no mere hyperbole.

The full import of that absoluteness emerges only when the First Amendment is considered in conjunction with the Ninth and Tenth Amendments. For while the First Amendment is not read as an absolute when Congress restricts speech incidental to the exercise of an enumerated federal power [*American Communications Association* v. *Douds*, 339 U. S. 382 (1950)], different considerations obtain when the Congress restricts expression unrelated to an expressly delegated federal power and affecting matters cognizable by the states [*Gitlow* v. *New York*, 268 U. S. 652, 672 (1925); *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294 (1952)]. When the Congress undertakes, as it did by the federal obscenity statute, to punish expression as a breach of the peace or offensive to morality or decency, it lays claim to jurisdiction over matter the Constitution intended to reserve to the states and the people thereof—a reservation historically implemented by absolutely barring the federal government from an area in which that government was without delegated power.

The body of the Constitution as originally adopted had no reference to the freedoms of speech or press. In the convention of 1787 the delegates considered the advisability of incorporating a provision on the subject but decided to omit it as unnecessary:

> "Friday, September 14, Mr. Pinckney and Mr. Gerry moved to insert a declaration 'that the liberty of the press be inviolably preserved.'
>
> "Mr. Sherman: 'It is unnecessary. The power of Congress does not extend to the press.'

"On this motion it passed in the negative." *Elliott's Debates* 545 (1901).

Such diverse persons as Thomas Jefferson and Alexander Hamilton, who scarcely agreed on anything, did agree on this: that no power over the press or speech had been delegated to the federal government. Hamilton in arguing against the Bill of Rights said: "For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" *The Federalist* 631 (Hamilton ed. 1864).

Jefferson responded:

> "Very well, I agree with you that the power is not legitimately here and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it not among such powers, we ask for a declaratory amendment to the Constitution which shall put if beyond peradventure that it is not one of the powers granted to the National Government." As quoted in Hart, *Power of Government over Speech and Press*, 29 Yale L. J. 410, 412 (1920).

See also,

Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 714 (1938).

In order to remove all possibility of doubt that Congress had no power over the press, not even an implied one, the Ninth Amendment provided:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

and the Tenth Amendment added:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The federal government was one of enumerated powers. This did not include any power over speech or the press. That which the First Amendment absolutely barred to the federal government, the Ninth and Tenth Amendments reserved to the states and the people—the bar and reservation necessarily co-existing and complementing each other. Thus it was that "fighting words", libel, defamation, etc., were matter for state, not federal action from the beginning. Cf. *Beauharnais v. Illinois, supra,* at 290.

Mr. Justice Frankfurter, in his opening address at the conference on "Government Under Law" held on September 22, 23, and 24, 1955 under the auspices of the Harvard Law School, commemorating the two-hundredth anniversary of the birth of Chief Justice Marshall, pointed out:

> "Thus, the gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to be recalled that even Jefferson attributed to the

> states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of the law—the [Sedition Act],' he wrote to Abigail Adams, 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so.' (I am indebted for the exact text of this letter, dated September 11, 1804, to the kindness of Professor Julian P. Boyd, in one of whose forthcoming volumes of 'The Papers of Thomas Jefferson' it will duly appear in its entirety.)" [*John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 225-226 (1955)].

Similarly, an expert in the history of the American Revolution observed that Jefferson's fellow Republicans in Congress, while opposing the Federalists' Sedition Act, "were not willing to leave the press entirely free; [they] * * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject'." Miller, *Crisis in Freedom*, 168-169 (1951).

The dissents of Justices Holmes and Brandeis in *Gitlow v. New York*, 268 U. S. 652 (1925), carefully distinguished between federal and local power over freedom of expression. Mr. Justice Holmes there indicated that the word

"liberty" as used in the Fourteenth Amendment perhaps "may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern the laws of the United States" (268 U. S. at 672). This concept was expanded in *Palko* v. *Connecticut*, 302 U. S. 319 (1937), and became the basis for the Court's decision in that case. Later, Justice Jackson perceptively wrote in *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294, 295 (1952):

> "As a limitation upon power to punish written or spoken words, Fourteenth Amendment 'liberty' in its context of state powers and functions have meant and should mean something quite different from 'freedom' in its context of federal powers and functions.
>
> * * * * *
>
> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.
>
> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitudes as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power."

The failure of the Congress to adopt Madison's proposal that the Constitution be amended to provide that "No State shall violate the equal rights of conscience, or the freedom of the press * * *" [1 *Annals of the Congress of the United States* 435 (Gales comp. 1834); 1 *The Debates and Proceedings in the Congress of the United States*, 452 (Gales ed. 1834)] is significantly corroborative of Justice Jackson's analysis.

Moreover, it is generally acknowledged that under "our federal system the administration of criminal justice is predominantly committed to the care of the states." *Rochin* v. *California*, 342 U. S. 165, 168 (1952); see also *Jerome* v. *United States*, 318 U. S. 101, 104, 105 (1943); *Malinski* v. *New York*, 324 U. S. 401, 412, 413 (1945). Congress may define crimes "only as an appropriate means of carrying into execution its limited grant of legislative powers." *Rochin* v. *California*, *supra*. Accordingly, since "the United States has no criminal jurisdiction over offenses against order and good manners" [Chafee, *Free Speech in the United States* 150 (1941); Ernst & Seagle, *To the Pure* 69-70 (1928); Schroeder, "*Obscene*" *Literature and Constitutional Law*, 140-141 (1911)], punishment of expression as obscene for offending decency, morality, or the peace falls most uniquely within the category of those subjects intended to be reserved to the states or the people and absolutely barred to the federal competence. For the offense of obscenity, if any, is against the community and its standards, and it is the community which must find the wrong to have been committed; it is for this reason that the issue of obscenity is one of fact for the jury, the voice of the community. Grant & Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 36, 147 (1930).

It is precisely the predominant influence of the local community in the definition and determination of the offense of obscenity which places that offense outside the scope of federal power. What is the *national* community to which one is to look to define obscenity for *federal* purposes? There is none.

> "The insuperable obstacle is the size and diversity of our Federalism * * * a single federal law against obscene publications which is supposed to impose the same standards upon all the states controls the reading of New York and San Francisco, New Orleans and Boston. * * * Neither our racial nor religious alignments augur well for a federal control of the obscene * * *.
>
> "Apart from such racial and religious differences in fact, there is no uniform sense of the obscene. The federal postmasters have not even such slender moral clues for their guidance as state officials have in the enacted laws relating to the general protection of the public morals" Ernst & Seagle, *To the Pure*, 70-72 (1928).
>
> "* * * there is no consistency in the decisions with respect to the same type of material from one period to another, or from one locale to another" *Report of the Select Committee on Current Pornographic Material*, H. R. Rep. No. 2510, 82d Cong. 2d Sess. 34 (1952).

The fallacy in hypothesizing some national community homogeneous as to matters of decency and morality—which is the indispensable prerequisite for federal obscenity legislation—is no mere philosophical or abstract constitutional objection. In a very real and substantial way it impairs freedoms which must be left to the states. For

when the federal government prosecutes and punishes the mailing of a publication, the effect is to ban the mailing thereof in every state; *even those states and communities which would not deem the mail indecent or immoral or obscene.* However else "non-mailable" as used in the instant obscenity statute may be defined, it is clear that a publication found to be obscene under it by a jury anywhere in the United States would be treated as "non-mailable" everywhere in the United States.

Differences in the application of substantially identical standards by New York and Boston have been fully documented. Grant & Angoff, *Massachusetts and Censorship,* 10 B. U. L. Rev. 147, 151-152, 164-172 (1930); Alpert, "*Judicial Censorship of Obscene Literature*", 52 Harv. L. Rev. 40, 53 ff. (1938). In addition, the different states have vastly differing legislative and judicial provisions concerning divorce, adultery, and fornication [Ernst & Seagle, *To The Pure,* 72 (1928)]—important constituents in defining the morality of a community. Accordingly, unless the federal government undertakes to measure the mails by the standards of the most liberal community—a charge to which it will surely demur—the federal power over obscenity involves foreclosing to some communities mail and literature they would not consider objectionable.

Of course, if the instant obscenity statute does not have the effect of imposing the standards of one community upon every other community in the United States, it has the even more absurd effect of permitting different results in different states upon the same state of facts under a single federal statute. A publication found to violate it in Boston could be found not to violate it in New York City.

This would yield the astonishing result of importing the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), into the application of a federal statute. *Cf. United States* v. *Turley*, 25 U. S. L. Week 4162 (U. S. Feb. 25, 1957); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447 (1942); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). Such potential for diversity and disharmony in the enforcement of a federal obscenity statute is compelling evidence that obscenity is a proper subject for state not federal power.

Plainly, then, the absence of any national community, and the bewildering varieties of local communities, confirm the absence of any federal power over matters of obscenity, and confine that power to the states and to the people.

That power which the Ninth and Tenth Amendments vest in the states and the people and the First Amendment expressly takes from the Congress is not to be subsumed from the postal power contained in Art. I, §8, cl. 7 of the Constitution.* The originators of that power never intended it to be other than an innocuous grant of authority [Rogers, *Postal Power of Congress* 23 (1916); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402 (1920)], so that while Congress may act to protect the physical integrity of the mail or of the instrumentalities for their transmission (see, *e.g.*, 18 U. S. C. §§1691-1733, 62 Stat. 776-785), Congress

* Since the instant obscenity statute is not confined to or, apparently, based upon mail travelling interstate or mail related to commerce, it is unnecessary to inquire into the extent to which federal power over obscene matter in interstate commerce is authorized by the commerce clause (Art. I, §8, cl. 3).

may not act to supervise the written content of that which passes through the mail. The job of the Post Office Department is that of carrying the mail not of censoring it. As Judge Arnold so aptly put it in the concluding paragraph of his opinion in *Esquire* v. *Walker*, 151 F. 2d 49, 55 (1945), *affirmed sub nom*; *Hannegan* v. *Esquire*, 327 U. S. 146 (1946):

> "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'."

The first proposal to restrict the use of the mails by printed matter because of its content came in 1835. In December of that year President Jackson proposed the passage of a law which would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection". Cong. Globe, 24th Cong., 1st Sess. 10 (1835). Northern anti-slavery agitation had become violent and the dissemination of abolitionist literature from the north throughout the south had assumed dangerous proportions. Nevertheless the proposal was defeated, 25-19. Cong. Globe App., 24th Cong., 1st Sess. 442 (1836). It was defeated because the Senators, from the South as well as from the North, regarded legislation barring abolitionist literature from the mails as a violation of the freedom of the press guarantee of the First Amendment. The men who voted against President Jackson's proposal were men who understood the original meaning and purpose of the Bill of Rights. They were men who were already past

their early childhood when the first Ten Amendments were adopted.

Because of the grave constitutional questions involved in President Jackson's proposal the Senate referred the measure to a select committee headed by Senator John C. Calhoun from South Carolina, bitter foe of abolitionist activities and intensely zealous for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering. Cong. Globe, 24th Cong., 1st Sess. 36-37 (1835). Yet he took his place with his Northern colleagues to denounce the measure as violative of the freedom of the press guarantee of the First Amendment.

On February 4, 1836, the select committee chaired by Senator Calhoun reported:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *.
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * *. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the

> constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *" S. Rep. 118, 24th Cong. 1st Sess. 1-3 (1836).

Senator Henry Clay, also from the South, as well as Senators John Davis and Daniel Webster, from New England joined in opposing President Jackson's proposal. They were sympathetic to the purposes of the measure, but they could not see their way clear to voting for it because of the prohibition of the First Amendment.

Senator Davis reminded his colleagues:

> "The liberty of the press was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner." Cong. Globe, 24th Cong., 1st Sess. 299 (1836).

Senator Davis had this further comment, which is even more pertinent today than when it was uttered:

> "The public morals were said to be in danger; it was necessary to prevent licentiousness, tumult, and sedition; and the public good required that the licentiousness should be restrained. All these were the plausible pretences under which the freedom of the press had been violated in all ages * * *." Cong. Globe App., 24th Cong., 1st Sess. 439 (1836).

Senator Clay considered this bill "unconstitutional; and if not so; that it contained a principle of a most dangerous and alarming character * * * after much reflection he had

come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * * the bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief * * *." *Ibid.*

Finally Daniel Webster, whose influence on the early development of our constitutional principles was second only to that of Chief Justice Marshall, vehemently attacked the bill. He declared that the freedom of the press included "the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" *Id.* at 437. Further: "Now against the objects of this bill he had not a word to say; but with constitutional lawyers there was a great difference between the object and the means to carry it into effect * * * Congress had not the power, drawn from the character of the paper, to decide whether it should be carried in the mail or not; for such decision would be a direct abridgment of the freedom of the press * * * he was shocked at the doctrine." *Id.* at 440.

This Court in an opinion by Justice Field reviewed these debates. *Ex parte Jackson*, 96 U. S. 727 (1878). Justice Field stated:

> "* * * In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would

> be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation." At 733-734.

For other accounts of this important incident in our history see 6 McMaster, *History of the People of the United States*, 288-291 (1883); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. Law Review 703, 717-723 (1938); Schroeder, *"Obscene" Literature and Constitutional Law*, 139-140 (1911).

Starting shortly after the defeat, for constitutional reasons, of President Jackson's proposal to prohibit abolitionist literature from the mails, the limits of the federal postal power, so forcefully and eloquently stated in the 1836 Senate debates, have been slowly and inexorably eroded by administrative action, by legislation, and by decision as the postal power came increasingly to be equated with some undefined federal police power; lotteries, contraception, prize fight films, frauds, etc., have been the subject of federal action under the postal clause. See Deutsch, *op. cit. supra* at 723 ff; Comment, *Federal Police Power Turns to the Postal Clause*, 5 Fordham L. Rev. 302, 305-310 (1936); Rogers, *The Extension of Federal Control Through the Regulations of the Mails*, 27 Harv. L. Rev. 27, 29-30 (1913); Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402, 404-405; Schroeder, *op. cit. supra* at 129-141, 232-236. But always necessarily reserved from these federal inroads were, and are "what might be called, somewhat elusively, purely local matters." Deutsch, *op. cit. supra* at 707; *Burton v. United States*, 202 U. S. 344, 371

(1906); *Ex parte Jackson, supra* at 732; *Pike* v. *Walker*, 121 F. 2d 37, 39, cert. denied, 314 U. S. 625 (1941). Such a minimal reservation must be acknowledged. Otherwise, federal power extends to libel,* defamation, matrimonial matters, contracts, realty, etc., etc., so long as the mails are employed in any connection, no matter how remote, with the wrong or the transaction. It can hardly be seriously contended that such is the magnitude of Congressional cognizance, especially in view of the history of the postal clause.

In *Ex parte Jackson, supra*, this Court further stated that the Fourth Amendment applied to the mails so as to protect sealed communications from unlawful searches and seizures. Justice Field writing for the Court said:

> "* * * No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." At 733.

This has remained the unquestioned law. But it is impossible to reconcile this principle with the premise that the postal power is plenary. If the exercise of the postal power is subject to the restraint of the Fourth Amendment

---

* In *Beauharnais* v. *Illinois, supra* at 290, Justice Jackson observed:

> "While there has been a demand from officials sources for a resumption of criminal libel prosecution, it has not been acceded to. Thus, while the jeopardy of such federal prosecutions has never been removed by any decision of this Court, I should think the validity of a federal enactment such as this would be extremely doubtful, to say the least."

it must be equally subject to the restraints of the First, Ninth and Tenth Amendments. No distinction is possible. The instant federal obscenity statute should be held unconstitutional as improperly invading powers reserved to the states and to the people.

II.

The instant federal obscenity statute violates the freedom of speech and of the press guarantees of the First Amendment.

Entirely apart from the reservations of rights and powers of the Ninth and Tenth Amendments, the instant federal obscenity statute falls afoul of the freedom of speech and of the press guarantees of the First Amendment. Legislation affecting freedom of speech or of the press, to be valid, must fall within certain narrow exceptions. The words must be such as are likely to incite to a breach of the peace [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942)], or such as have a sufficient probability to result in the overthrow of the government by force and violence [*Dennis* v. *United States*, 341 U. S. 494 (1951)]. Federal obscenity statutes do not fall within any of the narrow exceptions which the decisions of this Court have established.

The federal obscenity statute involved in this case, derives from an act originally passed in 1872, 17 Stat. 302, more than three-quarters of a century ago, as a result of the efforts of that feverish Puritan, Anthony Comstock. By virtue of an intensive campaign in which he denounced opponents as lechers and defilers of youth and American

womanhood, he succeeded in urging his bill through a busy Congress on the final day of its session. See Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 65 (1938). However, unlike other frenetic legislation which became dead in letter as in spirit [see e.g., *United States* v. *Williams*, 341 U. S. 70 (1951)], this statute has not become a Victorian vestigial remainder, but has been actively and frequently enforced, recently amended (see 69 Stat. 183), and promised vigorous prosecution for the future. See *Report of the Select Committee on Current Pornographic Materials*, H. R. Rep. No. 2510, 82d Cong., 2d Sess. (1952).

Despite the vitality as well as antiquity of the federal obscenity statute, this Court has never squarely considered or directly passed on the constitutionality of this statute. As Circuit Judge Frank in his concurring opinion in the court below said:

> "True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved in recent years" (R. 51). 237 F. 2d at 803.

See also Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 301, 352-358 (1954); Cushman, *National Police Power under the Postal Clause of the Constitution*, 4 Minn. L. Rev. 402, 411

(1920); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 729 (1938).

This Court has decided cases involving obscenity statutes where the validity of the statute was not challenged [see, *e.g.*, *United States* v. *Alpers*, 338 U. S. 680 (1949)], and in dicta has commented favorably on such statutes [see, *e.g.*, *Winters* v. *New York*, 333 U. S. 507, 510 (1948); *Hannegan* v. *Esquire*, 327 U. S. 146, 158 (1946)], yet when the issue of the compatibility between a state obscenity statute and the First Amendment was precisely raised and argued, this Court in one instance was equally divided and wrote no opinion [*Doubleday* v. *New York*, 335 U. S. 848 (1948)] and in another unanimously held the statute unconstitutional when it made criminal the general sale or distribution of literature tending to "incite minors" [*Butler* v. *Michigan*, 25 U. S. L. Week 4165 (U. S. Feb. 25, 1957)]. And at the last term this Court held in a *per curiam* decision that a state obscenity statute relating to motion picture films was unconstitutional under the First and Fourteenth Amendments, saying simply: "Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films* v. *Dept. of Education*, 346 U. S. 587." *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 P. 2d 412.

For nearly the first 130 years of the First Amendment's existence there were no important cases involving the freedoms which it guarantees. As Chief Justice Vinson pointed out in *Dennis* v. *United States*, 341 U. S. 494 (1951):

> "No important case involving free speech was decided by this Court prior to *Schenck* v. *United States*, 249 U. S. 47 (1919)." At 503.

It was not until the prosecutions resulting from World War I that the Court began to explore the implications of the constitutional guarantee for freedom of expression. And it was not until after the opinions of Chief Justice Hughes for the Court in *Stromberg* v. *California*, 283 U. S. 359, and *Near* v. *Minnesota*, 283 U. S. 697, in May and June 1931, that the First Amendment freedoms received their sturdiest development. If the reasoning in these and in the following decisions of this Court is applied to the federal obscenity statute in the instant case, then this statute must be held to be unconstitutional as violating the freedom of the press guarantee of the First Amendment. As Circuit Judge Frank stated in his concurring opinion in the Court below:

> "• • • I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years, relative to the First Amendment as applied to other kinds of legislation" (R. 49). 237 F. 2d at 802.

However, he went along with his colleagues on the ground that the invalidation of this statute was the business of this Court.

The framers of the Constitution and the first Ten Amendments were careful draftsmen. Had they intended any exceptions to what Justice Holmes in his dissent in *Abrams* v. *United States*, 250 U. S. 616, 631 (1919), characterized as the "sweeping command" of the First Amendment, they would have specified them. They did not do so.

Of course the framers had a contemporary factual situation in mind: they wished to repudiate the common law crime of seditious libel. In the words of Professor Chafee

"the framers of the First Amendment sought to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing sedition prosecutions". *Free Speech in the United States* 22 (1948).

The controversy over freedom of the press in that period involved a conflict between two views of government. According to one view the rulers were the superiors of the people, and could not be subjected to any censure that would tend to diminish their authority. The people could not make adverse criticism in newspapers or pamphlets, but only through their lawful representatives in parliament, who might be petitioned in an orderly manner. According to the second view the rulers were the servants of the people, who might therefore find fault with their servants and discuss questions of their punishment or dismissal as well as of governmental policy. Consequently, the words of Sir James Fitzjames Stephen about this second view have a vital application to American law: "To those who hold this view fully and carry it out to all its consequences there can be no such offense as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitement to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." 2 *History of the Criminal Law* 300 (1883).

Although the framers of the First Amendment had in mind a contemporary situation, their felicitous language looked ahead to the future. They provided no exceptions whatever to the sweeping prohibitions of the First Amendment. They intended none. There should be none. See

Meiklejohn, *Free Speech: And Its Relation to Self-Government*, chap. 2 (1948).

However, beginning with what Chief Justice Vinson in his opinion in *Dennis v. United States*, 341 U. S. 494, 503 (1951), described as Justice Holmes' "classic dictum" in *Schenck v. United States*, 249 U. S. 47 (1919), there is an exception for words which "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress had the right to prevent". At 52. Circuit Judge Frank in his concurring opinion in the Court below in the instant case suggested that in the light of this Court's opinion in the *Dennis* case he "would stress the element of probability in speaking of a 'clear danger'" (R. 94). 236 F. 2d at 826. In the *Dennis* case Chief Justice Vinson in applying the clear and present danger test adopted the interpretation of Chief Judge Learned Hand in the court below:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (341 U. S. at 510, 183 F. 2d at 212.)

But the narrow exception provided by the clear and present danger test does not help the government in the instant case, for there is no reasonable probability that allegedly obscene publications or pictures have any appreciable effect on the conduct of men, women or children. At the time that the misguided Anthony Comstock obtained as one of the fruits of his labors, more than three-quarters of a century ago, the first version of the federal

obscenity statute here in question, no one gave the slightest thought to this problem.

It is often assumed today that so-called obscene publications or pictures will cause sexual delinquency. The truth of the matter is that we do not know. The Court of Appeals of the State of New York in a recent case which is now before this Court, *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, 155 N. Y. S. 2d 639, 134 N. E. 2d 461 (1956), *probable jurisdiction noted*, 352 U. S. 962 (1957), pointed out this fact:

> "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e.g.*, Jahoda and Staff of Research Center for Human Relations, New York University [1954], The impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)" (1 N. Y. 2d at 181n.3.)

Such evidence as there is tends to indicate that neither publications nor pictures have much if anything to do with sexual or juvenile delinquency. Reference may be made in this connection to two studies, one by the Bureau of Social Hygiene of New York City and the other by the American Youth Commission, on young people in Maryland. Both studies bear out the fact that the sex education of the young comes from other sources than publications. Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 72 (1938); Bell, *Youth Tell Their Story* (1938). The Bureau of Social Hygiene of New York City sent questionnaires to 10,000 college and normal school

women graduates, and 1,200 answers were received. Not one specified a "dirty" book as the source of sex information. Of the 409 replies in answer to the question as to what things were most stimulating sexually, the majority noted very simply, "man". The American Youth Commission for its study took Maryland as a typical state and interviewed 13,528 young people there. This study showed that the chief source of sex education for the youth of all ages and all religious groups was youth's contemporaries. Only 4% reported that they owed most to books.

A recent summary of studies on juvenile delinquency by professors Lockhart and McClure in *Obscenity In the Courts*, 20 Law & Contemp. Prob. 587, 596 (1955), contains these conclusions:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any read by the delinquents. This is, of course, consistent with their finding that delinquents read very

> little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

Circuit Judge Frank quoted these conclusions and covered the authorities on this subject in the appendix to his concurring opinion (R. 66-77). 237 F. 2d at 811-817. Judge Frank wrote to Dr. Marie Jahoda, whose work is referred to in the quoted footnote 3 from the opinion of the Court of Appeals of New York in *Brown* v. *Kingsley Books*, *supra*, and asked her to supply him with her own summary of this work. She did so and he quoted it in his concurring opinion. She told him:

> "In the vast research literature on the causes of juvenile delinquency there is no evidence to justify the assumption that reading about sexual matters

> or about violence leads to delinquent acts. * * * " (R. 74). 237 F. 2d at 815.

See also Sheldon and Eleanor Glueck, *Unraveling Juvenile Delinquency* (The Commonwealth Fund 1950); Kinsey, *Sexual Behavior in the Human Female* 669-672 (1953); St. John-Stevas, *Obscenity and the Law*, 195-202 (1956); Ramsey, *The Sex Information of Younger Boys*, 13 Jour. of Orthopsychiatry 347-352 (1943).

If one were to say to a modern medical psychologist that the publications juveniles read or the pictures they see cause juvenile delinquency, he would at least feel that the speaker did not know what he was talking about. If one were to ask this medical psychologist what, in his opinion, causes juvenile delinquency he could reply in one word, aggression.

In light of the recent decision of this Court in *Butler* v. *Michigan*, *supra*, still another consideration must be added in the application of the "clear and probable danger" test. As we read that decision of the Court, the government does not sufficiently sustain the constitutionality of the federal obscenity statute merely by argument, or even demonstration, that obscene matter may tend adversely to influence the morals of minors. Such a tendency does not authorize punishment for the general circulation and distribution of a publication. For otherwise, in the words of Mr. Justice Frankfurter, the "incidence" of such legislation would be "to reduce the adult population * * * to reading only what is fit for children." *Butler* v. *Michigan*, *supra* at 4166. Consequently in order to sustain the instant obscenity statute, the government has the burden of demonstrating that allegedly obscene literature seriously and

imminently causes wrongful action or conduct on the part of reasonably mature and intelligent adults. We know of no responsible contention to this effect, and we challenge the government to supply any. Accordingly, we consider that the decision of this Court in *Butler* v. *Michigan*, *supra*, makes even more obvious the invalidity of this statute. The Court should hold it to be unconstitutional on its face and as here applied as violating the freedom of the press guarantee of the First Amendment.

III.

The instant federal obscenity statute violates the due process clause of the Fifth Amendment.

The concept of obscenity is as protean as any we have. There is nothing constant about it except its changeability. It changes not only from group to group but also from person to person. It changes not only from nation to nation but also from city to city and from city to country. It changes not only from one decade to another but also from one hour to another and from court to court. As Fluegel commented in *The Psychology of Clothes*: "Even within a given circle of intimates, what is considered quite permissible on one occasion may, a few hours later, be regarded as veritably indecent." At 19 (International Psychoanalytic Library, No. 18, Dr. Ernest Jones ed. 1930). What was considered obscene ten years ago is not so today and what is considered obscene today will not be ten years hence. The obscenity statute in the instant case, as Judge Frank pointed out in his concurring opinion, is thus "exquisitely vague" (R. 51). 237 F. 2d at 803. The word ob-

scenity, as Judge Frank stated in the appendix to his concurring opinion, is one of "exquisite vagueness" (R. 95). 237 F. 2d at 826.

Accordingly, at the last term the Court held that the word "obscene" was not a sufficiently definite one, at least upon which to base a system of prior restraint. *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 P. 2d 412. That case involved the motion picture *The Moon Is Blue*. A Kansas statute set up a board of review for films, and provided that this board should disapprove of such films as were "cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals". The board of review saw the film twice. The first time it disapproved with this notation: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme". Thereafter the plaintiff sought injunctive relief and the board saw the film again. This time it placed its decision squarely on the word "obscene", saying: "* * * The Board has found that film to be obscene, indecent and immoral, and such as tends to debase or corrrupt morals * * *".

The Supreme Court of Kansas in sustaining the board of review quoted the dicta from *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); and *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 505, 506 (1952) to the effect that there might be a First Amendment exception for that which was obscene. Nevertheless, this Court reversed in a *per curiam* decision.

The statute which the Court struck down in *Holmby Productions* was a civil as distinguished from a criminal one. But if the word "obscene" is not a sufficiently definite

one in a civil statute, even though what is involved is a question of prior restraint, then it is clearly not a sufficiently definite one upon which to base a criminal statute. As the Supreme Court pointed out many years ago through Chief Justice Waite in *United States* v. *Reese*, 92 U. S. 214, 220 (1876): "Every man should be able to know with certainty when he is committing a crime."

Many times under the due process clause this Court has invalidated statutes which did not provide reasonably ascertainable standards of guilt. Two recent examples are *Winters* v. *New York*, 333 U. S. 507 (1948), and *Musser* v. *Utah*, 333 U. S. 95 (1948).

In the *Winters* case this Court held invalid a penal law of the State of New York which prohibited publications that massed in their pages stories of bloodshed and lust, saying:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' Pierce v. United States, 314 U. S. 306, 311; Cantwell v. State of Connecticut, 310 U. S. 296. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." At 515.

In the *Musser* case the defendants preached polygamy and were convicted under a state statute which made it an offense to conspire to commit any action "injurious to public morals." There was a conviction which the Supreme Court of Utah affirmed, but this Court vacated the judgment and sent the case back for further proceedings not

inconsistent with the Court's opinion. The Court, speaking through Justice Jackson, said:

> "* * * Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. Cohen Grocery Co., 255 U. S. 81 * * *." At 97.

See also *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Cline* v. *Frank Dairy Co.*, 274 U. S. 445 (1927); *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (1914); *Collins* v. *Kentucky*, 234 U. S. 634 (1914). *Cf. United States* v. *Cardiff*, 344 U. S. 174 (1952).

We submit that Circuit Judge Frank was right in his concurring opinion when he stated that the federal obscenity statute does not have "a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or picture," citing cases (R. 95). 237 F. 2d at 826.

Reference may further be made to additional movie censorship cases where the Court struck down statutes on the ground that the language in them was not sufficiently definite. *Superior Films Inc.* v. *Ohio*, 346 U. S. 587 (1954) (Ohio statute involving the use of the words "immoral, educational, or amusing and harmless character"); *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954) (New York Statute using the word "immoral");

Gelling v. *Texas*, 343 U. S. 960 (1952) (Texas statute using the words "sexually immoral"); *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495 (1952) (New York statute using the word "sacrilegious").

Under the decided cases of this Court the words "obscene" (*Holmby Productions*), "immoral" (*Commercial Pictures*), "moral" (*Superior Films*), "sexually immoral" (*Gelling*), "sacrilegious" (*Burstyn*), "massed stories of bloodshed and lust" (*Winters*), "injurious to public morals" (*Musser*), are none of them sufficiently definite. Obscenity is capable of definition only by exhausting the list of equally undefinable synonyms. "All courts agree that the definition of obscenity is limited to the exhaustion of its synonyms; the disagreement arises in the arrangement of them." Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. Rev. 147, 155 (1930).

If obscenity is a term soft in the center, fuzzy at the edges, and elastic throughout when the subject of local law, it is confusion hopelessly confounded when the subject of federal law. At least in a local law the term has reference to some community standards of decency and morality. Such definition may have some discernible signification in a relatively homogeneous community such as a town, county, city or even some states. But it is wholly impossible of intelligible or objective construction when the community is the nation. What is obscene in Greenwich, Connecticut may not be obscene in Greenwich Village, New York; nudity means one thing to a naked boy on a sharecrop farm and another to a choir boy; a picture of a woman with her breasts exposed causes one reaction to the Florida resident who every day sees women exposed

in the sun for tanning and another to a prim Bostonian. Perhaps some extreme polar connotations of the word "obscene" may be found which will cover every community; but every word—including admittedly vague words, such as "good" or "bad"—has such semantic qualities. For purposes of the Fifth Amendment the word "obscene" in 18 U. S. C. §1461, as applied, is fatally vague because the penumbra between what is "obscene" and "not obscene" everywhere in the United States is as vast as the nation itself; such vagueness means that 18 U. S. C. §1461 contains no objective standards.

Nor is it any answer to this argument to say that a jury in each case decides what is obscene. A person still does not know in advance whether he is committing a crime. As Circuit Judge Frank pointed out in the appendix to his concurring opinion in the court below:

> "Each jury verdict in an obscenity case has been sagaciously called 'really a small bit of legislation ad hoc.' [United States v. Levine, 83 F. 2d 156, 157 (2d Cir. 1936)]. So each jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?" (R. 88). 237 F. 2d at 822-823.

Not only must statutes, particularly those with criminal sanctions, provide reasonably ascertainable standards of guilt in order to meet the requirements of due process,

but, further, if such statutes involve First Amendment rights the standards which they prescribe must be particularly clear and precise. Again as Circuit Judge Frank pointed out in the appendix to his concurring opinion:

> "Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See Stromberg v. California, 283 U. S. 359; Herndon v. Lowry, 301 U. S. 242; Winters v. New York, 333 U. S. 507; Kunz v. New York, 340 U. S. 290; Burstyn Inc. v. Wilson, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218" (R. 96). 237 F. 2d at 827.

For additional authorities to the same effect see *Musser* v. *Utah*, 333 U. S. 95 (1948); *United States* v. *C.I.O.*, 335 U. S. 106, 150-153 (1948); Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

Since the federal obscenity statute does not provide a reasonably ascertainable standard of guilt, the Court should hold it invalid as violating the due process clause of the Fifth Amendment. Particularly should the Court reach this result because of two additional considerations: this statute involves criminal sanctions;* and it applies to an area also under the protection of the First Amendment guarantee of freedom of the press.

---

* In the instant case petitioner received the severe punishment of a sentence of five years and a fine of $5000. By way of contrast, in most state court proceedings the punishment is much less. In *Butler* v. *Michigan*, 25 U. S. L. Week 4165 (U. S. Feb. 25, 1957), for instance, the punishment was a fine of $100.

CONCLUSION

We therefore request that the judgment of the Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

DAVID VON G. ALBRECHT,
DAVID P. SIEGEL,
O. JOHN ROGGE,
Attorneys for Petitioner.

On the brief:

PETER BELSITO
MURRAY A. GORDON
SIDNEY SILVERMAN